Understanding Zoning Variances

Factors for ZBA Consideration

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What Is a Variance?

The grant of a variance is, in essence, a decision by the ZBA to exempt a specific property from the requirements of a zoning regulation. Therefore, a grant of a variance creates a permitted nonconforming use. The New Hampshire Supreme Court has said, "Variances are included in a zoning ordinance to prevent the ordinance from becoming confiscatory or unduly oppressive as applied to individual properties uniquely situated." *Sprague v. Acworth*, 120 N.H. 641, 644 (1980).

A variance is required when a proposed new use or structure does not comply with the zoning ordinance. A variance is intended to be a relief valve to the literal or strict application of the zoning ordinance in a manner that is confiscatory or effects inequities in the operation of the zoning ordinance. "Variances are provided for by the zoning statutes so that litigation of constitutional questions may be avoided[.]" *Bouley v. City of Nashua,* 106 N.H. 79, 84 (1964).

Before 2004, New Hampshire law did not recognize a distinction between a use variance and an area variance (see *Ouimette v. City of Somersworth*, 119 N.H. 292 (1979) in which the Court, in dicta, declined to adopt a "practical difficulties" test for area variances). Then in 2004, the New Hampshire Supreme Court determined that distinct factors should be considered when applying the unnecessary hardship test to an area variance as opposed to a use variance. *Boccia v. City of Portsmouth*, 151 N.H. 85 (2004).

As explained in *Boccia,* a **use variance** "allows the applicant to undertake a use which the zoning ordinance prohibits[.]" An example of a use variance is a hotel in a zoning district otherwise restricted to residential use.

An **area variance**, also referred to as a dimensional variance, "authorizes deviations from restrictions which relate to a permitted use," according to *Boccia.* Area variances relate to physical or dimensional requirements, such as frontage, setbacks, height of buildings, extent of lot coverage and the like.

Justices Duggan and Dalianis explained the difference between use and area variances in their concurring opinion in *Bacon v. Town of Enfield,* the case that set the stage for *Boccia.* Use variances, they wrote, "pose a greater threat to the integrity of the zoning scheme" than area variances. Use variances interfere with zoning's traditional "segregation of land according to uses," while area variances relax limits on a use that is permitted by the zoning ordinance. *Bacon v. Town of Enfield*, 150 N.H. 468 (2004)(Justices Duggan and Dalianis concurring).

Variances run with the land. Once granted, a variance continues in effect even when the land changes ownership. A variance cannot be limited to a particular duration, however the zoning ordinance may provide for the variance permit to expire if not used within a specific period of time – for example, 12 months. Use of the variance within that time period may result in vesting of the property owner's right to continue under the permit. *Wentworth Hotel, Inc. v. New Castle*, 112 N.H. 21 (1972).

A variance can be lost by abandonment when evidence shows the landowner's intention to abandon or relinquish the use and, further, the landowner acts or fails to act in a manner that indicates he or she no longer claims or retains interest in the use. *Lawlor v. Town of Salem,* 116 NH 61 (1976). Determining if a variance has been lost by abandonment is heavily dependent on the facts of the specific case. Consultation with the municipal attorney is advised.

Attaching Conditions to Variance Approval

Even though there is no express statutory provision permitting a ZBA to attach conditions to the grant of a variance, the New Hampshire Supreme Court has held that the ZBA's "extensive powers include the authority to attach reasonable conditions where they are necessary to preserve the spirit of the ordinance." *Robinson v. Town of Hudson*, No. 2005-687 (December 20, 2006); *Vlahos Realty Co., Inc. v. Little Boar's Head District*, 101 N.H. 460 (1957); *Wentworth Hotel, Inc. v. New Castle*, 112 N.H. 21, 27 (1972). This authority is inferred from RSA 674:33, II, which enables the ZBA to "make such order or decision as ought to be made" in approving variances.

A condition must be reasonable, however, and "will not be upheld if it is unreasonable or arbitrary." *Robinson v. Town of Hudson*, No. 2005-687 (December 20, 2006); *Vlahos*, 101 N.H. at 463. Conditions should be in writing and in detail to avoid future enforcement problems.

It is often recommended that the ZBA consider attaching a time limit condition to the grant of a variance so that the variance will expire if substantial development of the use granted by the variance has not begun in a reasonable time – for example, 12 months. The New Hampshire Supreme Court has upheld the authority of the ZBA to condition the use of the variance on a specific time period, noting that use of the variance within that time period may result in vesting. *Wentworth Hotel, Inc. v. New Castle*, 112 N.H. 21 (1972).

The Court has held that the ZBA has jurisdiction over a request from a property owner to modify conditions attached to the grant of a variance. *Old Street Barn, LLC. v. Town of Peterborough*, 147 N.H. 254 (2001). The Court pointed out that RSA 674:33 grants the ZBA authority to modify administrative decisions upon appeal.

The Five Criteria for Variance Approval

Prior to the New Hampshire Supreme Court's *Simplex* and *Boccia* decisions in 2001 and 2004, respectively, a variance applicant was required to provide evidence proving that five criteria were satisfied before a variance could be granted. The *Simplex* and *Boccia* decisions dramatically changed the analysis of the unnecessary hardship criterion, but did nothing to change the fact that the same five criteria must be satisfied to approve a variance.

The five criteria are based on the enabling statute, RSA 674:33, I(b), which authorizes the ZBA to:

> grant a "variance from the terms of the zoning ordinance as will not be contrary to the public interest, if, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done."

Case law interpreting the statute added another criterion regarding the value of surrounding properties. *Gelinas v. Portsmouth*, 97 N.H.248 (1952). The five criteria are:

- ✓ **The variance is not contrary to the public interest**
- ✓ **Special conditions exist such that a literal enforcement of the provisions of the ordinance will result in unnecessary hardship**
- ✓ **The variance is consistent with the spirit of the ordinance**
- ✓ **Substantial justice is done**
- ✓ **The variance will not diminish the value of surrounding properties**

Public Interest and Spirit of the Ordinance

- ✓ **The variance will not be contrary to the public interest**

- ✓ **The variance is consistent with the spirit of the ordinance**

With its decision in *Chester Rod & Gun Club*, 152 N.H. 577 (2005), the New Hampshire Supreme Court continued to refine the analysis of the variance criteria under New Hampshire law that it began in 2001 with *Simplex*. However, in *Chester*, the refinement didn't involve unnecessary hardship, but focused on two of the other criteria for granting a variance – the public interest and spirit of the ordinance criteria. With *Chester*, the Court said that these two factors are related. The Court most recently analyzed these issues in *Malachy Glen Associates, Inc. v. Town of Chichester*, (No. 2004-886, 2006-111, March 20, 2007). The rules to be taken from these two cases are:

- The requirement that the variance not be contrary to the public interest is 'related to the requirement that the variance be consistent with the spirit of the ordinance.'

- To be contrary to the public interest … the variance must unduly and in a marked degree conflict with the ordinance such that it violates the ordinance's basic zoning objectives.

- One way to ascertain whether granting the variance would violate basic zoning objectives is to examine whether it would alter the essential character of the locality[.]

- Another approach to [determine] whether granting the variance would violate basic zoning objectives is to examine whether granting the variance would threaten the public health, safety or welfare.

See *Chester Rod & Gun Club v. Town of Chester*, 152 N.H. 577, 581 (2005).

Malachy Glen Associates centered on an eight-unit storage facility, a conforming commercial project in a commercial area that received site plan approval several years before the town enacted a 100-foot wetland buffer regulation. Shortly after the new buffer regulation was enacted, the property owner applied for a variance from the buffer requirement. Eventually, the ZBA granted a buffer variance solely for access to the property, but denied a variance for construction of the storage facility. The trial court found that the storage facility did not violate the buffer ordinance's basic objectives by altering the essential character of the locality because it would be located in an area that already included a fire station, gas station and telephone company.

The court also found that the project would not hurt the public health, safety or welfare because the ZBA granted a variance for access to the property that encroaches closer to the wetlands than the storage facility would. Also, the ZBA had evidence of the plaintiff's expert that the project would not hurt the wetlands, including plans for a closed drainage system, a detention pond and an open drainage system, all designed to ensure the wetland is not adversely affected.

The town argued that the ZBA is not bound by the conclusions of an expert and is entitled to consider its own knowledge of the area and conduct its own fact-finding, citing *Vannah v. Bedford*, 111 N.H. 105, 112 (1971), overruled on other grounds by *Cook v. Town of Sanbornton*, 118 N.H. 668, 671 (1978). The town and noted that a ZBA member commented that there had been "troubles" with wetlands that feed and overflow a nearby pond. However, as the trial court found, no further discussion resulted from this comment, there was no evidence to support it, it was not mentioned in the ZBA's statement of reasons for why the applicant had failed to satisfy the public interest and spirit of the ordinance requirements and it was not mentioned in the ZBA's notice of decision denying the variance.

The Supreme Court upheld the findings of the trial court and stated, "The mere fact that the project encroaches on the [wetland] buffer, which is the reason for the variance request, cannot be used by the ZBA to deny the variance." The Court also held, "No reasonable fact-finder could have found that the proposed project did not satisfy the public interest and spirit of the ordinance factors." *Malachy Glen Associates, Inc. v. Town of Chichester*, (No. 2004-886, 2006-111, March 20, 2007).

In *Chester*, the ZBA denied a variance requested on behalf of the Chester Rod & Gun Club to construct a 150-foot telecommunications tower on the club's property, which was in the residential district where telecommunications towers are not a permitted use. Among its reasons for denying the variance request, the ZBA found that the variance would be contrary to the public interest. The town meeting had previously approved a warrant article granting the selectmen authority to lease town land for a telecommunications tower. The ZBA determined that the town's voters had expressed the public interest by approving the warrant article, and a variance for a tower on the club's property would interfere with the lease of the town land for a tower.

The club appealed the ZBA decision to the superior court, which found that the ZBA had "improperly relied" on the town meeting vote to conclude that the variance would be contrary to the public interest. The town appealed to the Supreme Court, which explained:

> "The first step in analyzing whether granting a variance would be contrary to the public interest … is to examine the applicable zoning ordinance. As the provisions of the ordinance represent a declaration of public interest, <u>any</u> variance would in some measure be contrary thereto. Thus, to be contrary to the public interest … the variance must unduly and in a marked degree conflict with the ordinance such that it violates the ordinance's basic zoning objectives." *Chester Rod & Gun Club*, 152 N.H. 577, 581 (2005).

Instead of relying on the town meeting vote as an indication of the public interest, the Court said the ZBA should examine whether granting the variance would "alter the essential character of the locality" or threaten the public health, safety or welfare. If the variance would alter the essential character of the locality, the variance must be denied, the Court said.

The Court examined the purpose of Chester's residential district, which, according to the ordinance, is to "recognize the unique scenic, historic, rural and natural characteristics" of that part of town "while encouraging development … in a manner which will protect these important characteristics." Because the record was unclear whether the town's telecommunications facilities district ordinance applied to the club's variance request, the Court remanded the case to the ZBA for further deliberations utilizing the proper public interest analysis.

<u>More on Public Interest</u>

The applicant is not required to prove that his or her application for a variance will <u>benefit</u> the public, but must show only that granting the variance will not do harm. *Gray v. Seidel*, 143 N.H. 327 (1999). Prior cases had supported the notion that granting the variance must benefit the public interest.

More on Spirit of the Ordinance

The ZBA must consider the purpose of the zoning regulation when determining whether a variance would be consistent with the spirit of the ordinance. What effect would granting the variance have on the purposes and goals of the zoning ordinance?

In *Bacon v. Town of Enfield*, 150 N.H. 468 (2004), the ZBA denied a request for a variance to allow the property owner to construct a 4- by 5½-foot shed attached to her home to house a boiler so that she could convert the home's heating system from wood and electricity to propane gas. The shed was located within the 50-foot setback from Crystal Lake. Under the zoning ordinance, structures are prohibited within the 50-foot setback without a variance. The home was a pre-existing nonconforming use, but the town required a variance for any addition to the footprint within the 50-foot setback.

The ZBA denied the variance on three grounds, including that it would be contrary to the spirit of the zoning ordinance and not in the public interest. The trial court upheld the ZBA's decision. On appeal, Chief Justice Broderick wrote in the Court's lead opinion (Justices Duggan and Dalianis concurring in the result):

> "While a single addition to house a propane boiler might not greatly affect the shorefront congestion or the overall value of the lake as a natural resource, the cumulative impact of many such projects might well be significant. For this reason, uses that contribute to shorefront congestion and overdevelopment could be inconsistent with the spirit of the ordinance."

In *Harrington v. Town of Warner,* 152 N.H. 74 (2005), the Court found that the applicant, who sought to expand a mobile home park, had shown that the variance was not contrary to the spirit of the ordinance because mobile home parks were a permitted use in the zoning district, the mobile home park already existed there, the variance would not change the use of the area and, if he could have subdivided the property, he would have had sufficient acreage without a variance for the proposed expansion. *Harrington*, 84-85.

Harrington suggests, then, that when the proposed use of the property is a permitted use under the zoning ordinance, other factors affecting the "essential character of the locality" or threatening the public health, safety and welfare must be in evidence for the ZBA to find that the variance would be contrary to the spirit of the ordinance.

Unnecessary Hardship

- ✓ **Special conditions exist such that a literal enforcement of the provisions of the ordinance will result in unnecessary hardship**

The unnecessary hardship requirement is the focus of most of the variance cases and is the most difficult of the five variance criteria for the applicant to meet. *Simplex Technologies, Inc. v. Town of Newington*, 145 N.H. 727 (2001). Interpretation of the meaning of unnecessary hardship is based on RSA 674:33, I (b), which authorizes the ZBA to grant a variance from the terms of the zoning ordinance "if, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship[.]"

To meet the unnecessary hardship requirement prior to 2001, an applicant for a variance was required to prove that the zoning regulation would deny him or her any reasonable use of the property in question. In *Simplex*, the New Hampshire Supreme Court said this prior standard was a "restrictive standard of what constitutes unnecessary hardship." It held that variances had become so hard to obtain that the rights of property owners guaranteed by the New Hampshire Constitution, and the rights of municipalities to regulate land use had fallen out of balance. The Court stated, "In this balancing process, constitutional property rights must be respected and protected from unreasonable zoning restrictions." The Court established a new unnecessary hardship standard, which has come to be known as the *Simplex* test.

Because the Court later found a distinction between use variances and area variances (see *Boccia v. City of Portsmouth*, 151 N.H. 85 (2004)), the *Simplex* unnecessary hardship test applies only to use variances, and the *Boccia* unnecessary hardship test applies only to area variances.

Use or Area Variance?

All ZBA members, code enforcement officers and other local officials must base there decisions on the fact that there are two kinds of variances – use variances and area (dimensional) variances – and that the difference between the two hinges on the analysis of the unnecessary hardship criterion. The general analysis is the same for both kinds of variances, beginning with the language of RSA 674:33: "Special conditions exist such that a literal enforcement of the provisions of the ordinance will result in unnecessary hardship[.]" Whether the ZBA is considering a use variance or an area variance, the applicant should provide some evidence that there are special conditions of the property that make a literal enforcement of the regulation an unnecessary hardship.

It is not always easy to tell the difference between a use variance and an area variance. For example, if no uses are permitted within a wetland setback area and a property owner wants to build a residential dwelling within the wetland setback, must the ZBA consider the application as a use variance or an area variance? The answer depends on the specific facts of each case.

Since the law requires separate factors to be applied to use variances and area variances, it is not always readily apparent which type of variance applies to a given set of facts. The Court dealt with this issue in *Harrington v. Town of Warner*, 152 N.H. 74 (2005). In that case, the applicant owned a 46-acre parcel in a medium density residential zone in which manufactured housing parks were permitted. There were 33 mobile homes and 54 campground sites already on 26 acres of the property. The owner wanted to add 26 mobile home sites on the property's remaining 20 acres.

Under the town's zoning ordinance, a minimum of 10 acres was required for manufactured housing parks, and the number of sites was limited to 25. Town officials were uncertain whether the ordinance limited the number of sites to 25 per 10 acres, or 25 regardless of the size of the parcel as long as the parcel was at least 10 acres.

Because the parcel lacked required road frontage, the property owner was unable to subdivide it, which would have given him two 10-acre parcels on which he could locate 25

mobile home sites each. Therefore, given the town's uncertainty over interpretation of the zoning ordinance, he applied for a variance. The ZBA granted the variance, but limited the number of additional sites to 25, to be developed at no more than five sites per year.

The abutters, the Harringtons, appealed to the superior court, which affirmed the ZBA's decision. They then appealed to the Supreme Court, arguing that the applicant failed to show unnecessary hardship; created his own financial hardship because he purchased the property with knowledge of the zoning restrictions; and failed to prove other variance criteria, including that the variance was consistent with the spirit of the zoning ordinance and would do substantial justice.

Distinguishing between a use or area variance didn't matter until the Court's decision in *Boccia*, but in *Harrington*, the ZBA granted the variance before *Boccia* was decided and, therefore, applied the *Simplex* test regardless of whether the applicant sought a use or area variance. However, the case reached the Supreme Court after *Boccia*. Since the applicant sought a variance from the 25-site limitation, the Court began its analysis by first determining whether the request was for a use or area variance. In other words, the Court had to first decide which unnecessary hardship test to apply – the *Boccia* factors or the *Simplex* factors. The Court said:

> "A use variance allows the landowner to engage in a use of the land that the zoning ordinance prohibits," while "[a]n area variance is generally made necessary by the physical characteristics of the lot. In contrast to a use variance, an area variance involves a use permitted by the zoning ordinance but grants the landowner an exception from strict compliance with physical standards such as setbacks, frontage requirements, height limitations and lot size restrictions. As such an area variance does not alter the character of the surrounding area as much as a use not permitted by the zoning ordinance."
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> "The critical distinction between area and use variances is whether the purpose of the particular zoning restriction is to preserve the character of the surrounding area and is thus a use restriction. If the purpose of the restriction is to place incidental physical limitations on an otherwise permitted use, it is an area restriction. Whether the variance sought is an area or use variance requires a case-by-case determination based upon the language and purpose of the particular zoning restriction at issue."

The Court compared the zoning ordinance's manufactured housing park provision to another provision of the town's ordinance that permitted manufactured housing subdivisions on a minimum 12-acre lot. According to that provision, the maximum number of lots "in any manufactured housing subdivision shall not exceed 25." The Court emphasized the word "any" in this provision and interpreted it to mean that regardless of the size of a parcel, as long as it was a minimum of 12 acres, it was limited to 25 manufactured housing sites. "Thus, unlike an area restriction, the limitation on the number of manufactured housing sites is not related to the acreage or other physical attributes of the property," the Court wrote. "Rather, the restriction limits the intensity of the use in order to preserve the character of the area."

In fact, the Court added, the town's overall zoning scheme, with three residential districts, segregates land by types of uses as well as by intensity of use. For example, two-family dwellings were permitted in the village and medium density districts, but permitted only by special exception in the low-density district. "[G]iven the language and purpose of the zoning ordinance," the Court concluded, "the provision limiting the number of sites to 25 lots is a use restriction."

While unnecessary hardship for use variances and area variances is determined by distinct tests, it is possible that a single application may contain requests for both types of variances. If so, each variance request should be analyzed separately, applying the *Simplex* hardship test to the use variances sought and the *Boccia* hardship test to the area variances sought.

Use Variances and the *Simplex* Test

To meet the *Simplex* unnecessary hardship standard, an applicant for a use variance must prove:

- A zoning restriction as applied to their property interferes with their reasonable use of the property, considering the unique setting of the property in its environment;

- No fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and

- The variance would not injure the public or private rights of others.

Reasonable Use and Unique Setting

Since this three-prong test was enunciated in *Simplex*, several cases have been decided that interpret the requirements of the first prong.

Rancourt v. City of Manchester, 149 N.H. 51 (2003) was one of the first cases that offered further insight into how the first prong of the *Simplex* standard should be analyzed. The Court held that a zoning ordinance precluding horses from the R-1A district (a low-density residential zone) "interfered with the [owners'] reasonable proposed use of their property, considering its unique setting."

The first prong of the *Simplex* standard requires the applicant to show that the zoning restriction "as applied to their property interferes with their reasonable use of the property, considering the unique setting of the property in its environment." In *Rancourt*, the Court upheld the ZBA's grant of a variance allowing the property owners to build a barn and keep two horses on their three-acre lot, even though keeping livestock was not permitted in that residential zone. Abutters argued there were no "special conditions" warranting the approval of the variance. The Court said:

> "Whereas before *Simplex*, hardship existed only when special conditions of the land rendered it uniquely unsuitable for the use for which it was zoned …, after *Simplex*, hardship exists when special conditions of the land render the use for which the variance is sought 'reasonable.'"

What are "special conditions?" The Court said, "In the first prong of the *Simplex* test, 'special conditions' are referred to as the property's 'unique setting … in its environment." This is where the specific facts of the case come in to play. In analyzing "special conditions" and the property's "unique setting," the Court pointed to the following factors:

- The owner's three-acre lot is larger than most surrounding lots.
- The lot is uniquely configured in that the rear portion of the lot, which is where the barn was to be built, is larger than the front of the lot.
- There is a "thick, wooded buffer" around the paddock area.
- The area where the horses were to be kept is 1½ acres, which is more land than the zoning ordinance requires for keeping two livestock animals in other zoning districts in the city.

The Court said these factors are the "special conditions" that make it reasonable for the owner to have a barn and two horses on their residential lot "considering its unique setting." The rule from *Rancourt* is that "hardship exists when special conditions of the land render the use for which the variance is sought 'reasonable.'"

The first prong of the *Simplex* test was again at issue in *Garrison v. Town of Henniker*, No. 2005-471, (August 2, 2006). Green Mountain Explosives (GME) applied for use variances to construct and operate an explosives storage and blending facility, a commercial use, in a residential zone. GME planned to lease a 1,617-acre parcel that comprised 18 separate lots. The explosives facility would be centrally located on 20 acres of the larger parcel; the remaining acreage would act as a buffer zone around the facility as required by federal Bureau of Alcohol, Tobacco and Firearms (ATF) regulations.

The ZBA granted the variances, and Garrison and other abutting landowners appealed. The superior court reversed the ZBA's decision because the evidence before the ZBA failed to demonstrate unnecessary hardship. The superior court found that the zoning regulations did not interfere with the reasonable use of the property and that there was no evidence that the property "is different from other property zoned rural residential." The superior court stated, "While its size may make it uniquely appropriate for GME's business, that does not make it unique for zoning purposes."

GME appealed to the Supreme Court, which upheld the lower court's decision. As evidence of the parcel's special conditions justifying a use variance, GME said the large and uninhabited parcel made it ideal for GME's proposed use, allowing it to store explosives away from occupied structures, which would also allow it to comply with the federal ATF regulations. The Supreme Court said it agreed with the superior court's finding that these factors did not demonstrate that the proposed site was unique or "different from other

property zoned rural residential." Evidence before the ZBA that development of the large parcel as a residential subdivision was difficult or unlikely failed to demonstrate "a special condition of the land that distinguishes it from other land in the same area with respect to the suitability for the use for which it is zoned."

The Supreme Court said, "[T]he record merely demonstrates that the proposed site was large, difficult to develop because of its topography and relatively isolated location, and ideally suited to GME's needs because it could provide a buffer zone as required by the applicable ATF regulations. These factors alone, however, do not distinguish GME's proposed site from any other rural land in the area."

GME argued that the same factors at issue in *Rancourt* should control the outcome in its case, namely the large size of the parcel, its relatively inaccessible location and buffer zone were "special conditions of the property" that were the basis for granting a variance. The Supreme Court disagreed and said, "In *Rancourt*, the size, configuration, location and buffer made the property unique, as compared to the surrounding lots. … The evidence presented by GME simply did not demonstrate that its proposed site was similarly unique in its setting."

GME also argued that the difficulty in developing the property as a residential subdivision was evidence that the town's rural residential restriction interfered with the reasonable use of the property as an explosives storage and blending facility. The Supreme Court, citing *Harrington*, said that determining interference with the reasonable use of the property "includes consideration of the landowner's ability to receive a reasonable return on his or her investment." Actual proof, "often in the form of dollars and sense evidence" is necessary to determine reasonable return on investment, and "mere conclusory and lay opinion … is not sufficient."

In *Harrington*, the mobile home park case, the Court also considered the issue of reasonable return on investment in its analysis of whether the zoning restriction interfered with the owner's reasonable use of the property.

Evidence that the zoning restriction interfered with the landowner's reasonable use of the property includes: mobile home parks are a permitted use in the zoning district; and if the landowner had adequate road frontage to subdivide the 20 acres from the rest of the parcel, he would have had sufficient acreage for a mobile home park on the new lot.

Other factors considered under the first prong of the *Simplex* unnecessary hardship test, the Court said, are "whether the hardship is a result of the unique setting of the property" as well as "consideration of the surrounding environment," including whether the landowner's proposed use would alter the essential character of the neighborhood."

Evidence that there were unique conditions of the property includes: inability to subdivide the property because of inadequate road frontage; constructing a new road to provide adequate frontage was "almost impossible" because of the location of the existing campground, the existing mobile home park and the presence of swamp lands; and the fact that improvements to a private road in the mobile home park would not remedy the inadequacy in road frontage.

Finally, the Court found that expansion of the mobile home park would not adversely affect the character of the area. The ZBA had considered its impact on schools and traffic and, to lessen the impact on schools, the ZBA conditioned approval of the variance on phasing in

the 25 new mobile home sites at a rate of five per year. Availability of affordable housing provided by the new mobile home sites was also evidence that expansion of the mobile home park would not adversely affect the character of the area.

Lest ZBA members think they are the only ones whose variance decisions are overturned by the courts, the facts in *Community Resources for Justice, Inc. v. City of Manchester*, No. 2006-609, (decided January 24, 2007), indicate that judges also have trouble applying the unnecessary hardship test. CRJ applied for a use variance to operate a halfway house, under contract with the Federal Bureau of Prisons, in the city's central business district in a building that housed commercial and residential uses. The city's building commissioner had determined that a halfway house was a correctional facility and, under the city's zoning ordinance, correctional facilities are not permitted in any of the city's zoning districts.

The ZBA denied the variance, finding that CRJ had not satisfied the unnecessary hardship standard. CRJ appealed, and the superior court reversed the ZBA decision, finding that CRJ had satisfied the *Simplex* unnecessary hardship requirements, including that the zoning restriction unduly burdened CRJ's reasonable use of the property. But the Supreme Court reversed the superior court, explaining that there was no evidence that CRJ's property was burdened by the zoning restriction "in a manner that was distinct from similarly situated property. Nor does the evidence reasonably support the trial court's conclusion that the hardship resulted from special conditions of the land, rather than the area in general." CRJ offered as evidence of special conditions that the property was located near public transportation and treatment facilities and other city services that halfway house residents might need. But the Court said, "[T]here was no evidence in the certified record that demonstrated how the size and layout of this specific building made the property particularly appropriate for the proposed use."

Self-Created Hardship

In *Harrignton*, the abutters who appealed the ZBA's decision to grant the variance argued that because the zoning regulation was in place before the applicant purchased the exiting mobile home park and property, any hardship experienced was self-created. The Court cited its previous decision in *Hill v. Town of Chester*, 146 N.H. 291 (2001), which held that "purchase with knowledge" of the zoning restrictions does not preclude the landowner from obtaining a variance, but should be a factor considered under the first prong of the *Simplex* test.

The Court said, "To counter the fact that the hardship was self-created because the landowner had actual or constructive knowledge of the zoning restrictions, the landowner can introduce evidence of good faith." Among the ways an applicant can show good faith, the Court said, are: compliance with rules and procedures of the ordinance; use of other alternatives to relieve the hardship before requesting a variance; reliance upon the representations of zoning authorities or builders; no actual or constructive knowledge of the zoning requirement. *Harrington v. Town of Warner*, 152 N.H. 74, 84 (2005).

The Court said the mobile home park owner was advised in writing by the town's selectmen before purchasing the property that the mobile home park could be expanded subject to planning board approval and compliance with the building code. Also, the Court said, the ZBA was uncertain whether the 25-site limitation for mobile home parks applied per 10 acres or was an absolute maximum and, therefore, the applicant acted in good faith in applying for a variance.

The Other Two Prongs of *Simplex*

As the New Hampshire Supreme Court has said, the first prong of the *Simplex* test "is the critical inquiry for determining whether unnecessary hardship has been established." *Harrington v. Town of Warner*, 152 N.H. 74, 80 (2005). So it may not be surprising that since *Simplex*, the unnecessary hardship cases have all hinged on the first prong of the three-prong test. The cases interpret issues related to reasonable use of the property and the need to show evidence of special conditions unique to the specific property as compared to other properties under the same zoning restrictions. But there are two other prongs of the unnecessary hardship test that the applicant must be satisfy. The issues considered under the first prong often overlap with issues considered under the second and third prongs. It is unclear whether the second and third prongs just haven't been at issue in the cases that have been litigated, or whether the Court has focused so much on the first prong that the other two prongs have been overlooked. At the very least, the Court is still working its way through the consequences of its post-*Simplex* overhaul of the unnecessary hardship analysis.

The second prong requires that the zoning regulation bear a "fair and substantial relationship" to the purpose of the ordinance. This is language drawn from the middle-tier constitutional analysis, but it isn't altogether clear yet how to apply it in the practical situation of a use variance application. Under this step in the analysis, the ZBA must consider the reasons for the zoning regulation at issue – the purposes the ordinance was designed to serve – and ask whether those purposes are fairly and substantially served by the regulation when it is applied to the parcel in question. The purpose of the zoning regulations is also analyzed under the first prong of the test when evidence of the variance's impact on the character of the locality is considered.

The third prong in the *Simplex* unnecessary hardship test is whether the use variance would injure the public or private rights of others. In *Chester Rod & Gun Club*, the variance case about the telecommunications tower, the Court said this prong of the unnecessary hardship test is "coextensive" with the requirement that the variance not be contrary to the public interest. This seems to mean that the same factors considered under the public interest criterion are to be considered when analyzing the third prong of the *Simplex* test. (The dictionary definition of "coextensive" is: "having the same spatial or temporal scope or boundaries.")

In *Chester*, the ZBA determined that granting the variance for a telecommunications tower on the club's property would injure public rights established by the town meeting vote to authorize the selectmen to lease town land for a telecommunications tower. The Court said the ZBA had improperly relied upon the town meeting vote as an indication of public interest (therefore, public rights) and, instead, should have examined whether granting the variance would alter the essential character of the locality (also considered under the first prong of the unnecessary hardship test) or threaten the public health, safety or welfare.

We'll have to await further interpretation by the Court of future cases to know what factors should be considered under the third prong of the *Simplex* test, but it seems reasonable that the ZBA should consider whether the variance would result in a public or private nuisance.

Area Variances and the *Boccia* Test

A case came before the New Hampshire Supreme Court in 2004 that it characterized as "a paradigm of the problem faced by zoning boards and courts when they attempt to apply the *Simplex* standard to area variances." The applicant proposed a 100-room hotel on a seven-acre site in a zoning district in which hotels were a permitted use. The applicant requested six variances from front, rear and side setback requirements. The Court explained the problem thusly:

> "Because *Simplex* was decided primarily in the context of a use variance, it established a test which is geared toward determining whether the use for which the applicants seek a variance is reasonable considering the property's unique setting in its environment. … The question remains, however, whether this *Simplex* test governs the unnecessary hardship prong when seeking an area variance. We do not believe it does."

The Court added, "[D]istinguishing between use and area variances will greatly assist zoning authorities and courts in determining whether the unnecessary hardship standard is met." The Court, therefore, established the two-prong unnecessary hardship test for area variances.

- An area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property

- The benefit sought by the applicant cannot be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance

Special Conditions of the Property

"Special conditions," as we know from the use variance cases, requires that the applicant demonstrate that its property is unique in its surroundings. *Malachy Glen Associates, Inc. v. Town of Chichester*, (No. 2004-886, 2006-111, March 20, 2007), quoting *Garrison v. Town of Henniker*, No. 2005-471, (August 2, 2006). The special conditions requirement applies to both use and area variances.

In addition, in area variance cases, the proposed project "is presumed to be reasonable if it is a permitted use under the town's applicable zoning ordinance … If the use is allowed, an area variance may not be denied because the ZBA disagrees with the proposed use of the property." *Vigeant v. Town of Hudson*, 151 N.H. 747, 752-53 (2005).

In *Vigeant*, the ZBA's denial of an area variance for a five-unit multifamily housing project was overturned. The Court said it was improper for the ZBA to suggest that a two-unit residential building was more appropriate for the site when multifamily housing was a permitted use in the zoning district. The special conditions of the property involved its configuration, location of two abutting streets and location of wetlands on the property.

It is instructive to compare the density issues raised by the ZBA in *Vigeant* with the density issues involving expansion of the mobile home park in *Harrington*. The Court interpreted the zoning restriction in *Harrington* – 25 mobile home sites per 10 acres of property – as a density restriction. There was no such density limitation in the zoning ordinance involved in *Vigeant*.

When analyzing "special conditions," the Court has said, "Satisfaction of the requirement that the circumstances which result in unnecessary hardship be peculiar to the applicant's property is most clearly established where the hardship relates to the physical characteristics of the land." *Malachy Glen Associates, Inc. v. Town of Chichester*, (No. 2004-886, 2006-111, March 20, 2007), quoting 3 K. Young, *Anderson's American Law of Zoning*, § 20.36, at 535 (4th ed. 1996).

In *Malachy,* the case about the eight-unit storage facility (a permitted use) and 100-foot wetland buffer, the special conditions of the property were that nearly 65% of it is made up of wetlands or the 100-foot buffer, and the configuration of the wetlands further reduced the property's buildable area.

Whether the issue is a use variance or an area variance, "special conditions" of the property must exist to prove unnecessary hardship. In the context of a use variance, under the first prong of the *Simplex* test, "the unique setting of the property in its environment" means its "special conditions." In the context of an area variance, the "special conditions" of the property require an area variance to enable the applicant's proposed permitted use of the property. Therefore, for area variances, it is the applicant's proposal that must be considered (in other words, the applicant's 100-room hotel, not the abutter's suggested 60-room hotel; or the applicant's five-unit multifamily building, not the ZBA's preferred two units).

Even though a permitted use is presumed to be a reasonable use of the property in the context of an area variance, in neither the consideration of a use variance nor an area variance is it enough for the applicant to show simply that the use of the property is reasonable. The applicant has the burden of proving there are special conditions of the property that make the variance necessary.

Other Reasonably Feasible Method

Under the second prong of the unnecessary hardship area variance test, "[T]he ZBA must look at the project as proposed by the applicant, and may not weigh the utility of alternate uses in its consideration of the variance application." *Malachy Glen Associates, Inc. v. Town of Chichester*, (No. 2004-886, 2006-111, March 20, 2007), citing *Vigeant v. Town of Hudson*, 151 N.H. , 747, 753 (2005) ("In the context of an area variance … the question [of] whether the property can be used differently from what the applicant has proposed is not material.").

In addition, "The applicant must show that there are no reasonably feasible alternative methods available to implement the proposed use." *Malachy Glen Associates, Inc. v. Town of Chichester*, (No. 2004-886, 2006-111, March 20, 2007), quoting *Boccia v. City of Portsmouth*, 151 N.H. 85, 93 (2004).

Also considered is "whether an area variance is required to avoid an undue financial burden of the landowner, which includes examination of the relative expense of alternative methods." *Malachy Glen Associates,* citing *Boccia,* 151 N.H. at 93.

"If the proposed project could be constructed such that an area variance would not be required, the burden is on the applicant to show that these alternatives are cost-prohibitive. Under this factor, the ZBA may consider the feasibility of a scaled down version of the proposed use, but must be sure to also consider whether the scaled down version would impose a financial burden on the landowner." *Malachy Glen Associates,* quoting *Boccia*, 151 N.H. at 93 ("[T]his factor examines whether there is a reasonably feasible method or methods of effectuating the proposed use without the need for variances.")

In *Malachy Glen Associates*, the trial court found that in order to comply with the zoning ordinance, the applicant would have to "reduce its project by more than 50%" and that this "would result in financial hardship." Since the 50% reduction was "the only alternative to the project given the configuration of the property," the Court concluded, "the record was sufficient for the trial court to find, as a matter of law, that there was no other reasonably feasible method of effectuating the proposed use without obtaining an area variance."

Substantial Justice

- ✓ **An applicant seeking a variance must demonstrate that substantial justice is done**

A "guiding rule" on this factor is that "any loss to the individual that is not outweighed by a gain to the general public is an injustice." *Malachy Glen Associates, Inc. v. Town of Chichester*, (No. 2004-886, 2006-111, March 20, 2007), quoting 15 P. Loughlin, *New Hampshire Practice, Land Use Planning and Zoning* § 24.11, at 308 (2000) (quoting New Hampshire Office of State Planning, *The Board of Adjustment in New Hampshire, A Handbook for Local Officials* (1997)).

Also determinative of this factor is "whether the proposed development was consistent with the area's present use." *Malachy Glen Associates, Inc. v. Town of Chichester*, (No. 2004-886, 2006-111, March 20, 2007), citing *Labrecque v. Town of Salem*, 128 N.H. 455, 459 (1986).

In *Malachy Glen Associates,* the ZBA found that the applicant failed to meet the substantial justice factor because, as the trial court stated, "there was no evidence that scaling the project down would make it economically unviable." However, the Supreme Court said, "[T]his is not the proper analysis under the 'substantial justice' factor." The Court noted that the record provided evidence that "the project will not harm the wetlands, no abutters came forward against the project, and the project is an otherwise permitted use in the district. Accordingly, the trial court did not err in finding the plaintiff had established this factor."

Value of Surrounding Properties

- ✓ **The value of surrounding properties will not be diminished**

Testimony or evidence should be presented to the board by the applicant to show that granting the variance will not result in the lowering of the value of surrounding properties. Abutters and other interested parties may present evidence to the contrary. One side or another may present the testimony of property appraisers or other experts. Board members can give whatever weight they determine proper to this evidence and are not bound to accept the conclusions of experts. Members may also consider their own personal knowledge regarding traffic conditions and other relevant information. *Vannah v. Bedford,* 111 N.H. 105.

Exception for Disability

RSA 674:33, V gives the ZBA authority to grant a variance without applying the five variance criteria in situations "when reasonable accommodations are necessary to allow a person or persons with recognized physical disability to reside in or regularly use the premises[.]" Such a variance must be "in harmony with the general purpose and intent of the zoning ordinance." Further, the statute allows the ZBA to limit the term of the variance to "only so long as the particular person has continuing need to use the premises."

When Is a Variance Not Required?

Preexisting Nonconforming Uses

The zoning ordinance does not apply to a structure or use lawfully established prior to enactment of the zoning regulation that prohibits that structure or use. See RSA 674:19. These structures or uses are referred to as preexisting nonconforming. They are "grandfathered" from the terms of the zoning ordinance. They are similar to variances in that they are land uses that are exempt from the terms of the zoning ordinance, but they do not require variances in order to continue as they exist at the time the ordinance is enacted. For example, in *Morgenstern v. Town of Rye*, 147 N.H.558 (2002), the Court held that a variance is not required to build on a substandard lot when the property owner acquired a vested right to build.

According to RSA 674:19, the zoning ordinance applies to "any alteration of a building for use for a purpose or in a manner which is substantially different from the use to which it was put before alteration." However, some expansion of preexisting nonconforming uses is permitted without requiring a variance as long as four criteria established by the New Hampshire Supreme Court are met. They are:

- The expansion is a "natural activity, closely related to the manner in which the piece of property is used" when the ordinance was enacted (the same use modernized through new technology).

- The proposed use is simply a different manner of utilizing the same use, not a use that is different in character, nature or kind.

- The proposed use does not have a substantially different effect on the neighborhood.

- If the nonconformity is of a dimensional requirement, the expansion or change does not render the property proportionally less adequate in relation to the dimensional requirement (setback, frontage, etc.).

See *Hurley v. Hollis*, 143 NH 567 (1999) and *New London Land Use Assn. v. New London ZBA*, 130 NH 510, 516 (1988). A full discussion of nonconforming uses and vested rights is beyond the scope of these materials, but for more information on this topic see 2002 Municipal Law Lecture # 3 *Grandfathered: Nonconforming Uses and Vested Rights* by H. Bernard Waugh, Esq., available from the Local Government Center (New Hampshire Municipal Association) at 1-800-852-3358 or www.nhlgc.org.

Governmental Uses Not Subject to Zoning Ordinances

When there is no statute to the contrary, the state and its political subdivisions – which include towns, cities, village districts, school districts and counties – are not subject to local zoning regulations when the land use involves a governmental function, such as a fire station, school, highway, etc. *McGrath v. City of Manchester*, 113 N.H. 355 (1973). Therefore, the state and its political subdivisions are not required to obtain a variance in order to develop land to carry out their public health, safety and welfare functions.

However, these governmental entities must comply with RSA 674:54, which requires them to give written notice to the governing body of the municipality of any governmental use of property that constitutes "a substantial change in use or a substantial new use." Under the statute, the municipality, usually the planning board, may hold a public hearing on the proposed governmental use and may issue nonbinding written comments on "the conformity or nonconformity of the proposal with normally applicable land use regulations[.]"

Preemption by State or Federal Regulation

State law preempts local regulation when the state has enacted a comprehensive regulatory scheme that would conflict with or be frustrated by local regulation. See, for example, *North Country Environmental Services, Inc. v. Town of Bethlehem*, 150 N.H.606 (2004). Preemption can occur in the land use area in the operation of solid waste facilities, siting of snowmobile trails on public property, development of community living facilities for developmentally disabled persons, location of hazardous waste sites, location of public utility structures and electricity transmission lines, crushing of stone, pesticide use and other situations.

When state law is comprehensive, sometimes it expressly permits additional municipal regulation. For example, several preemption cases have held that a local zoning ordinance was preempted, however the municipality retained site plan review authority. *Whitcomb v. Town of Carroll*, 141 N.H. 402 (1996). Also, federal law may preempt local regulation. See *Koor Communication, Inc. v. City of Lebanon*, 148 N.H. 618 (2002). Preemption issues should be discussed with the municipality's regular attorney.